MOTION FILED
NOV 16 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1654

CONSUMER ENERGY COUNCIL OF AMERICA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

BRIEF FOR *AMICI CURIAE*, UNITED STATES CONFERENCE OF MAYORS, AMERICAN PUBLIC GAS ASSOCIATION, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA (NATIONAL FARMERS' UNION)

CHARLES F. WHEATLEY, JR.
WHEATLEY & WOLLESEN
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

November 16, 1978

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1654

CONSUMER ENERGY COUNCIL OF AMERICA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*, UNITED STATES CONFERENCE OF MAYORS, AMERICAN PUBLIC GAS ASSOCIATION, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA (NATIONAL FARMERS' UNION)

Pursuant to Rule 42, the United States Conference of Mayors, the American Public Gas Association, the Indus-

trial Union Department, AFL-CIO, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), Farmers' Educational and Cooperative Union of America (National Farmers' Union) move to file the attached brief as *amici curiae* in support of the Petitioner, Consumer Energy Council of America (formerly the Energy Policy Task Force of the Consumer Federation of America) in No. 77-1654, and Petitioner, Federal Energy Regulatory Commission in No. 77-1552.

The *amici curiae* have obtained the written consent of the Solicitor General on behalf of the Federal Energy Regulatory Commission and of the Consumer Energy Council of America for the filing of the attached brief. However, not all of the Respondents, consisting of most of the major oil companies in the United States, have consented to *amici's* brief. Below in the court of appeals for the Fifth Circuit the *amici curiae* herein joined in filing a brief on the merits as *amici curiae* to that court, which was accepted.

The issues raised in this case concern the extent of the power and duty of the Federal Energy Regulatory Commission to enforce delivery obligations of producers of natural gas specified in certificates of convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act. The *amici* who have joined in this brief represent millions of people throughout the United States who are dependent upon adequate and consistent supplies of natural gas delivered by the nation's interstate pipelines.

The court of appeals for the Fifth Circuit below, in deciding that the Federal Energy Regulatory Commission lacked jurisdiction under the Natural Gas Act to set reasonable terms and conditions for the delivery of natural gas by producers selling gas in interstate commerce

to the nation's interstate pipeline companies when issuing certificates for such deliveries under Section 7 of the Natural Gas Act of 1938, 15 U.S.C. §717 *et seq.* would leave the Commission powerless to require the production of any volumes of gas for the service of interstate consumers.

The *amici curiae* believe that the position that they have set forth in their brief, stressing the existing regulations under Section 7 of the Natural Gas Act, and the established system of certificates containing express evidence of deliverability requirements for the pipelines, are matters which have not been presented by the parties and are clearly relevant to the disposition of the case. Under the certificates presently issued to the nation's interstate pipelines, concrete details of deliverability requirements had been presented to the Commission, backed up by specific contracts between the pipelines and producers, which had been ruled upon by the Commission in issuing certificates. Indeed, the detailed exhibits required by the Commission's regulations setting forth the deliverability requirements of gas supply have been the keystone upon which billions of dollars have been spent by the pipelines and distributors in constructing facilities to serve consumers over the years. *Amici* submit that these facts and long standing administrative practice under the Commission's Regulations dealing with certificates will not be presented by any other party and are relevant to the disposition of the case.

For the foregoing reasons, the *amici curiae* move that the attached brief be accepted by the Court for filing.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
WHEATLEY & WOLLESEN
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

Page

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

QUESTIONS PRESENTED 6

ARGUMENT

I. The Commission Below Erred in Order 539-B In Abandoning The Requirement Of Its Long-Standing Regulations To Set Forth Clear Deliverability Obligations When Issuing Certificates And In Imposing In Place Thereof The Vague "Prudent Operator" Test Which Left Deliverability Largely In The Hands Of The Producers 7

A. The Certificate System Under Section 7 of the Natural Gas Act Has Provided the Structure for the Construction and Development of the Entire Interstate Gas System Now Serving Consumers in the United States 7

B. Order No. 539-B Establishing A New "Prudent Operator" Standard Departed From the Requirement of the Regulations For Compliance With Prior Certificated Deliverability Volumes. 13

II. The Decision Below Of The Court of Appeals For The Fifth Circuit Barring Commission Jurisdiction To Set Reasonable Terms And Conditions For The Deliverability Of Natural Gas Is Clearly In Error 18

CONCLUSION. 26

TABLE OF AUTHORITIES

Cases:

American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) 6

State of California v. Southland Royalty Co., 436 U.S. 519, 56 L.Ed.2d 505 (1978) 12, 18, 19, 21, 25

Cases, continued: Page

M.H. Marr v. FPC, 336 F.2d 320 (5th Cir. 1964) 24

Northern Natural Gas Co., FPC Op. No. 618, 47 FPC 1202 (1972) 12

Order No. 539, issued October 14, 1975 . . . . . 13, 15

Order No. 539-A, issued March 26, 1978 15

Order No. 539-B, issued July 30, 1976 . . . . . 13, 15-17

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 6

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 22, 25

Sun Oil Co. v. FPC, 364 U.S. 170 (1960) 19

Sunray Midcontinent Oil Co. v. FPC, 364 U.S. 137 (1960) 19, 21, 25

Transwestern Pipeline Co., FPC Op. No. 574, 43 FPC 322 (1970) 11

Transwestern Pipeline Co., FPC Op. No. 500, 36 FPC 176 (1966), *aff'd, Southern Calif. Edison Co. v. FPC*, 387 F.2d 619 (3d Cir. 1967), *cert. denied*, 392 U.S. 909 (1968) 11-12

United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 23, 25, 26

Statutes and Regulations:

Natural Gas Act, 15 U.S.C. §§717, *et seq.* . . . . . *passim*

18 C.F.R. §2.83 . . . . . 14, 15

18 C.F.R. §§157, *et seq.* . . . . . *passim*

Other Authorities:

Final Annual Report, 1977, Federal Power Commission (July, 1978) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1654

CONSUMER ENERGY COUNCIL OF AMERICA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

BRIEF FOR *AMICI CURIAE*, UNITED STATES CONFERENCE OF MAYORS, AMERICAN PUBLIC GAS ASSOCIATION, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA (NATIONAL FARMERS' UNION)

INTEREST OF *AMICI CURIAE*

Pursuant to Rule 42, the United States Conference of Mayors, the American Public Gas Association ("APGA"), the Industrial Union Department, AFL-CIO,

United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), Farmers' Educational and Cooperative Union of America (National Farmers' Union) submit this brief as *amici curiae* in support of the petitioner, Consumer Energy Council of America (formerly the Energy Policy Task Force of the Consumer Federation of America) in No. 77-1654) and petitioner, Federal Energy Regulatory Commission in No. 77-1652.

The issues raised in this case concern the extent of the power and duty of the Federal Power Commission to enforce the delivery obligations undertaken by producers of natural gas when they accept certificates of public convenience and necessity from the Commission. The *Amici* who have joined in this brief represent millions of people throughout the nation who depend on adequate and consistent supplies of natural gas for their necessities of life and for their livelihood.

The United States Conference of Mayors is an organization of the mayors of the 750 cities in the United States whose populations exceed 30,000 people and, since its founding in 1933, has become a unique national representative of urban interests. Any reduction in the supply of natural gas would seriously compromise the ability of any of these cities to maintain essential municipal services. The present crisis finds the cities encumbered with extensive investments in natural gas facilities, created in reliance on the presumed continuity of the supply of this gas; and their residents depend on it for fuel and heat. The cities are also subject to regulations, such as those of the Federal Clean Air Act, which make their reliance on natural gas more desperate. Forced conversion to coal or oil without adequate lead time to assess the impacts of

such conversion can only increase the complexity of a city's struggle for compliance with those regulations. Cities are also the primary centers of national economic activity: manufacturing and food processing are but two of the major industries, concentrated in cities, which would suffer gross, adverse consequences from any significant reduction in the supply of gas. The unemployment and loss of tax revenues caused by these shortages would further tax already overburdened municipal services.

The American Public Gas Association is an association of approximately two-hundred publicly owned gas distribution systems located throughout the United States. APGA is vitally concerned with obtaining adequate supplies of natural gas for its members, so that they can adequately perform their public responsibilities; and it has been a frequent party in Federal Power Commission proceedings and cases on issues related to those now before this Court.

The labor organizations which join as Amici represent millions of workers and their families who depend on natural gas, both as it relates to their means of livelihood and as a source of domestic heat and fuel. The Industrial Union Department (IUD) is a department of the AFL-CIO which seeks to promote the common interests of workers who belong to industrial unions. IUD consists of fifty-six national and international unions within the industrial sector having a total membership in excess of six million working men and women employed throughout the United States. Workers represented by IUD depend upon an uninterrupted flow of gas in two ways: First, as consumers its members are directly affected when natural gas supplies

fall short. Second, as employees of industries throughout the country, IUD's members are faced with layoffs when gas supplies fail at their plants, and with an array of adverse consequences which flow from the economic upheaval produced in their industries when the cost of a vital energy source spirals because of artificial shortages. IUD members have already experienced such problems to an alarming and increasing degree. The United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is the largest industrial union in the world. It represents approximately one million four hundred thousand members. If the families of these workers are included, the UAW represents more than four and a half million persons throughout the United States and Canada. The UAW is mandated by its Constitution and tradition to become involved in the issues concerning the quality of life and is vitally concerned with its members' rights as employees and citizens.

The cases before the Court involve a major issue in the administration of the Natural Gas Act of 1938 ("NGA") 15 U.S.C. §717 et seq. as heightened by the recently enacted amendments thereto in the Natural Gas Policy Act of 1978 ("NGPA") Act of November 9, 1978, Pub. L. No. 95-621, which vitally affects the nation's consumers of natural gas. The court of appeals for the Fifth Circuit below in deciding that the Federal Energy Regulatory Commission lacked jurisdiction under the Natural Gas Act to set terms and conditions for the delivery of natural gas by producers selling gas in interstate commerce to the nations' interstatement pipeline companies when issuing certificates for such deliveries under Section 7 of the NGA, reverses *sub silentio* years of precedents by this Court and lower

federal courts and vests the producers with new carte blanche powers to refuse to deliver previously-certificated volumes of gas necessary to supply interstate consumers. That the court in so doing reversed the Federal Power Commission's Order No. 539-B is ironic because that order in establishing a new standard of "prudent operator" for producers had seriously undermined its existing powers to enforce the requirements of the Natural Gas Act as they relate to deliverability and the rendition of natural gas service under certificated arrangements pursuant to the Act.

Since the net impact of the Commission's Order No. 539-B was to seriously impair the enforcement of deliverability by producers, and the holding of the court below to deny it altogether, the *amici curiae*, dependent on the continued availability of interstate gas from existing certificates, have been adversely affected. The widespread curtailment by interstate pipelines of distributors holding long-term firm contracts for the delivery of gas based upon certificates previously issued by the Commission containing express findings of deliverability of specified minimum volumes of natural gas by producers to the pipelines which has not been met, have adversely impacted *amici* as well as interstate consumers throughout the nation.[1]

Not only do the decisions below adversely affect *amici* and other consumers in terms of assuring deliverability by producers of existing committed supplies, but

---

[1] The Commission reported that curtailments by interstate pipelines of firm customers reached 3,379,672 million cubic feet in the period April 1977 to March 1978 and were projected to increase to 3,898,812 million cubic feet April 1977 to March 1978. *Final Annual Report, 1977*, Federal Power Commission (July, 1978), p. 18.

they also can have an important impact on the prices paid by consumers for gas. Natural gas prices have been met by the Commission in a series of area rates,[2] followed by national rates,[3] which in each instance allowed a higher price for "new" gas for wells drilled after certain dates than for "old" gas in older wells previously committed to interstate commerce. The Natural Gas Policy Act of 1978 retains distinction between the pricing of "old" and "new" gas in establishing new ceilings for natural gas. To the extent that the Commission cannot order producers in issuing certificates of convenience and necessity under Section 7 of the Act to meet any deliverability standards from existing committed supplies of old gas, the producers can refuse to deliver gas from such committed old wells and shift to deliver gas from new wells at higher prices. Thus the power in the Commission to enforce meaningful terms and conditions governing deliverability from wells committed to interstate commerce is essential, both to the enforcement of certificated supplies to lessen curtailments and to protect consumers from the adverse price consequences of vesting unlimited discretion in producers to withhold lower-priced old gas supplies in favor of higher priced new gas supplies.

QUESTIONS PRESENTED

1. Whether the "prudent operator standard" enunciated in the Federal Power Commission's Order 539-B constitutes a proper measure for enforcing the interstate

---

[2] *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[3] American Public Gas Association v. FPC, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

delivery obligations of natural gas producers under certificate of public convenience and necessity issued pursuant to Section 7 of the Natural Gas Act.

2. Whether the Federal Energy Regulatory Commission is precluded by the "production and gathering" exemption contained in Section 1(b) of the Natural Gas Act from enforcing, in accordance with an appropriate standard, producers' certificated delivery obligations.

ARGUMENT

I.

THE COMMISSION BELOW ERRED IN ORDER 539-B IN ABANDONING THE REQUIREMENT OF ITS LONG-STANDING REGULATIONS TO SET FORTH CLEAR DELIVERABILITY OBLIGATIONS WHEN ISSUING CERTIFICATES AND IN IMPOSING IN PLACE THEREOF THE VAGUE "PRUDENT OPERATOR" TEST WHICH LEFT DELIVERABILITY LARGELY IN THE HANDS OF THE PRODUCERS.

A. The Certificate System Under Section 7 of the Natural Gas Act Has Provided the Structure for the Construction and Development of the Entire Interstate Gas System Now Serving Consumers in the United States.

The background of the existing structure of the interstate gas industry serving consumers in the United States rests on Section 7 of the Natural Gas Act, 15 U.S.C. §717c, enacted in 1938. Section 7 of the Act provides that, except for certain preexisting grandfathered facilities, no sale of natural gas subject to the jurisdiction of the Commission[4] could take place without obtaining a certificate of convenience and necessity from the Commission:

---

[4] The issue of the scope of the Commission's jurisdiction, as ruled upon by the court below, is treated at pp. 18 *infra*.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction on extension shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

* * *

. . . the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: . . . . (15 U.S.C. §717f(c).)

Section 7(e) of the Act authorized the Commission in issuing a certificate to set forth the terms and conditions to govern service thereunder:

> . . . a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acqusition covered by the application, if it is found that the applicant is able and willing properly to do the acts *and to perform the service proposed and to conform* to the provisions of this chapter *and the requirements, rules, and regulations of the Commission thereunder,* and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent

> authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. *The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as to public convenience and necessity may require.* (15 U.S.C. §717f(e); emphasis added.)

That Congress contemplated that deliveries of supplies of natural gas would be specified in the certificates is clear from the language of Section 7(b) of the Act, barring abandonment of service without express Commission authorization:

> (b) *No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities,* without the permission and approval of the Commission first had and obtained, after due hearing, *and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted,* or that the present or future public convenience or necessity permit such abandonment. (15 U.S.C. §717f(b); emphasis added.)

Pursuant to Section 7, the Commission early issued detailed regulations governing applications thereunder for certificates. The purpose and intent of the rules was prescribed in the regulations as follows:

> §157.5 *Purpose and intent of rules*
>
> (a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or

the abandonment for which permission and approval is requested. . . . Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to §157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon application's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant. (17 Fed. Reg. 7386, Aug. 14, 1952, as amended by Order 280, 29 Fed. Reg. 4876, Apr. 7, 1964, 18 CFR, §157.5)

The regulations specifically set forth the exhibits required by a pipeline applicant for a certificate requiring detailed information about gas supply, deliverability and the volumes of gas reserves available under each contract with a producer:

§157.14 *Exhibits*

(a) *To be attached to each application.* All exhibits specified shall accompany each application when tendered for filing . . .

* * *

(10) *Exhibit H—Total gas supply data.* A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:

(i) The estimated remaining recoverable salable gas reserves available to applicant submitted in the form and containing all the data and information required by FPC Form No. 15, Annual Report of Gas Supply. (See §260.7 of this chapter.)

(ii) *Deliverability studies showing the volumes of natural gas which can and are proposed to be obtained each year submitted in the form* and containing the data and information as required by FPC Form No. 15, Annual Report of Gas Supply.

(iii) *The names and addresses of persons with whom applicant has gas-purchase contracts and the estimated volumes of gas reserves applicant has available under each contract,* segregated by gas fields and reservoirs thereof with names and locations of fields (State, county or parish).

(iv) The maps required by FPC Form No. 15, Annual Report of Gas Supply.

(v) A conformed copy of each gas-purchase contract upon which applicant proposes to rely. . . ." (18 CFR §157.14(a)(10); emphasis added).

Thus, a pipeline seeking to construct or enlarge its facilities for the service of consumers has been required to set forth in its certificate application precise data on the supply of natural gas and deliverability studies of the volumes of natural gas that can be produced as well as the contracts and reserves with producers supporting such deliverability.[5] Other sections of the regulations

[5] Transwestern Pipeline Company, *et al.*, FPC Op. No. 574, 43 FPC 322, 331-39 (1970); Transwestern Pipeline Company, *et al.*,

[footnote continued]

provide for notice of all applications to be given, so that any producer not agreeing with the representatives by the pipeline applicant as to the deliverability of reserves from his contract, can petition to intervene. 18 CFR §157.9.[6] The major decisions on the supply of gas necessary for a project would be made as a condition precedent to the issuance of a certificate therefor.

It is clear that the entire existing structure of the interstate system serving natural gas to ultimate users is premised upon the certificates previously issued by the Commission under Section 7 of the Act and the regulations thereunder set forth above. Billions of dollars have been spent by interstate pipeline companies to build and construct their present pipeline systems to their present capacity. At the heart of each application by an interstate pipeline to construct or expand its pipeline system has been its certificate application containing therein the specific deliverability studies and gas supply data, based on specific contracts with producers to demonstrate that in fact the new investment proposed would have an adequate supply of gas from the producers. Based upon this concrete specific factual evidence of deliverability and supply, the interstate pipelines have been authorized through the issuance of the certificates to enter new contracts with each of its distributor customers to provide firm deliveries. In reliance on their new firm contracts, each

FPC Op. No. 500, 36 FPC 176, 210-12 (1966), *aff'd*, Southern Calif. Edison Co. v. FPC, 387 F.2d 619 (3d Cir. 1967), *cert. denied*, 392 U.S. 909 (1968); and Northern Natural Gas Co., *et al.*, FPC Op. No. 618, 47 FPC 1202, 1215-16 (1972).

[6] As this Court noted in *State of California v. Southland Royalty Co.*, 436 U.S. 519, 56 L.Ed. 2d 505, 513 (1978), the respondents could have intervened in the certificate proceedings before the Commission, but there did not do so.

of the distributors in turn have invested substantial sums of money within its distribution system to serve its retail users.

B. Order No. 539-B Establishing A New "Prudent Operator" Standard Departed From the Requirement of the Regulations For Compliance With Prior Certificated Deliverability Volumes.

As originally promulgated, Order No. 539, issued by the Federal Power Commission on October 14, 1975 set forth a "statement of policy" "with respect to the enforcement of the requirements of the Natural Gas Act . . . as they relate to deliverability and the rendition of natural gas service under certificate arrangements pursuant to that act." In Order No. 539, the Commission set forth its resolve to insure that certificated arrangements for the delivery of natural gas would be enforced. The Commission stated:

Enforceability of Certificated Arrangements—Upon commencement of jurisdictional sales or services, this Commission has full authority to enforce the rendition of, *inter alia*, natural gas services, sales or operations, as certificated by the Commission, including as a part thereof, necessary deliverability or production of natural gas to meet, inter alia, certificated operations, services, developments, quantities, volumes or sales.

As certificated, such factors may or may not accord with the terms of sales or other contractual arrangements among natural gas producers, pipelines or distributors in seeking Commission authority to engage in jurisdictional sales or services. To the extent that contractual obligations coincide with the certification authority, these factors are thus also enforceable as a matter of

private contract law. However, it is the statutory standards of the Natural Gas Act which ultimately control the terms under which natural gas companies may operate jurisdictional facilities and engage in jurisdictional transactions. Certificated obligations are enforceable by pipelines as a matter of the private law of contracts as well as by this Commission as a matter of public regulatory law.

The Commission then ordered the addition of a new section 2.83 to its "General Policy and Interpretations" under its regulations as follows:

> *2.83 Policy With Respect To Enforcement Of Deliverability And Rendition Of Natural Gas Services Under Certificated Arrangements.*
>
> (a) Natural Gas Companies within the meaning of Section 2(6) of the Natural Gas Act (whether producers or pipelines) shall comply with all deliverability or production of natural gas requirements to meet, *inter alia,* certificated operations, services, developments, quantities, volumes, or sales. The standards of compliance shall be the controlling statutory standards of the Natural Gas Act, chiefly those of Sections 4, 5, and 7 thereof. The certificate of the Commission authorizing jurisdictional transactions under the Natural Gas Act shall be deemed evidence of those requirements, whether or not specifically reproduced within the certificate document or order. Natural gas pipeline companies and natural gas producers have obligations arising from the Natural Gas Act with respect to, *inter alia,* deliverability and receipt of certificated volumes of natural gas supplies, violation of which obligations will subject either to the sanction and/or penalty provisions of that Act. While this Commission is charged with responsibility of the administration of the Natural Gas

> Act, regulated pipelines and producers have affirmative obligations to enforce delivery of certificated volumes of natural gas supplies by reasons of the requirements of that Act.

As such, Order 539, as originally issued by the Federal Power Commission, clearly required the enforcement of existing certificated volumes of natural gas supplies by producers.

A number of producers filed for rehearing, and the Commission granted rehearing and issued Order 539-A on March 26, 1976. Order 539–A reaffirmed Section 2.83 of the Commission's general policy and interpretations with two minor amendments to Section 2.83(d). In Order 539-A, the Commission, however, granted the Motion of Shell Oil Company for an oral argument relating to Section 2.83.

After oral argument, the Commission on July 30, 1976, issued Order No. 539-B, which reversed the prior orders, deleted Section 2.83 from the statements of General Policy and Interpretation of the Commission, and inserted a completely new Section 157.41 of the Commission's Regulations incorporating the "prudent operator" standard. Ordering paragraph (B) of Order 539-B provided as follows:

> (B) The Commission, acting pursuant to its authority under the Natural Gas Act, as amended, particularly Sections 4, 5, 7 and 16 thereof, 15 U.S.C. 717c, 717d, 717f, and 717o, hereby orders that its General Rules, Title 18 of the Code of Federal Regulations, be amended by adding a new Section 157.41 as follows:
>
> On and after July , 1976, all certificates of public convenience and necessity for the sale of natural gas for resale in interstate commerce shall be conditioned as follows:

> All persons making jurisdictional sales pursuant to the authority granted by this certificate are hereby given notice that the contractual obligations between the buyer and the seller are incorporated into the certificate obligations, and that the certificate is further conditioned to require that the seller shall observe the standard of a prudent operator to develo and maintain deliverability from reserves dedicated hereunder.

The major failing of Order 539-B lies in its substantial departure from the longstanding prior regulations of the Commission wherein the deliverability, reserves and actual contracts providing for gas deliveries are specified in the certificate applications upon which final certificates are issued. Despite the express exhibits showing the actual deliverability requirements from the particular contracts and leases involved, in the future the producers could refuse to comply with these deliverability requirements on the ground that it was not consistent with their responsibilities as a "prudent operator." Thus, in place of concrete deliverability requirements set forth in the certificates, the producers can avoid delivering any such volumes on the ground that it is inconsistent with their responsibilities as a "prudent operator." If the producers can now rely upon the vague, undefined standards of a "prudent operator", the objective deliverability requirements of the certificates will become meaningless or severely watered down.

The Commission in Order 539-B never really gave a clear definition as to what it means by the prudent operator standard. At the outset, it appears that the Commission relied upon some implied convenant in lease agreements or some vague standards to comply with state regulatory conservation requirements. The

very vagueness of the standard as elucidated by the Commission in Order 539-B reveals its impropriety. Any implied convenants in lease agreements, have little or nothing to do with the enforceability requirements of federal certificates, necessary to protect interstate consumers to ensure the delivery of certificated volumes of gas, upon which millions of dollars have been spent in reliance on firm gas supplies. The Commission does not state that this "implied convenant in lease agreements" is identical to provisions of state regulatory agencies dealing with conservation of natural resources. The provisions of any state law pertaining to conservation are not set forth and analyzed. Furthermore, the operations of a producer under state law to preclude the waste of natural gas, undoubtedly would be completely different than a requirement issued by the Federal Energy Regulatory Commission to require the production of certain volumes of natural gas to meet consumer requirements in times of curtailment.[7]

The Commission's retreat in Order 539-B to the standard of "prudent operator," derived from vague references to lease operator or conservation standards under state law, cannot substitute for clear precise certificate responsibilities established by the Commission under Section 7 and the regulations thereunder. As such, the Commission's action in Order 539-B is contrary to the position it took when asked to rely on local law as a reference

---

[7] Furthermore, the Commission's reference to the requirements of the Department of Interior relating to its offshore regulations is similarly not in point. The Commission has made no showing that the Department of Interior regulations dealing with offshore leases have anything to do with the requirements set forth in Section 7 of the Natural Gas Act and the Commission's longstanding regulations thereunder which require certain specified deliveries of natural gas volumes in order to supply certificated facilities authorized under the Act.

point in determining whether service had been abandoned under Section 7(b) of the Act once previously certificated. This Court has recently held in *State of California, et al. v. Southland Royalty Company, et al.*, 436 U.S. 519, 56 L.Ed.2d 505 (1978) that the Commission would abdicate its statutory powers if it relied upon state law in those cir..mstances:

> We conclude that the Commission acted within its statutory powers in requiring that respondents obtain permission to abandon interstate service. 'A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.' *United Gas Improvement Co. v. Continental Oil Company*, 381 U.S. 392, 400 (1965). By tying the concept of dedication to local property law, respondents would cripple the authority of the Commission at a time when the need for decisive action is greatest. Guided by *Sunray*, we believe that the structure and purposes of the Natural Gas Act require a broader view of the Commission's authority. (56 L.Ed.2d at 514.)

II.

THE DECISION BELOW OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT BARRING COMMISSION JURISDICTION TO SET REASONABLE TERMS AND CONDITIONS FOR THE DELIVERABILITY OF NATURAL GAS IS CLEARLY IN ERROR.

The court of appeals below in holding that the FERC is prohibited by the specific exclusion of the "production and gathering of natural gas" set forth in Section 1(b) of the Natural Gas Act, 15 U.S.C. §717(b) from imposing any terms and conditions in certificates upon

delivery requirements, is patently erroneous, and would overrule *sub silentio*, years of prior precedents by this Court.

First, the court's decision below is inconsistent with the long line of cases to the effect that the FERC can enforce "service obligations" contained in the certificates that it issues to producers, preventing producers from ceasing deliveries from fields admittedly capable of continuing production. *Sunray Midcontinent Oil Company v. FPC*, 364 U.S. 137 (1960) and *Sun Oil Company v. FPC*, 364 U.S. 170 (1960). This Court recently reaffirmed the principle of those decisions in *State of California, et al. v. Southland Royalty Company, et al.*, 436 U.S. 519 (1978). In the *Southland Royalty Company* case, this Court held as follows:

> . . . in *Sunray Mid-Continent Oil Co. v. Federal Power Commission, supra*, the Court recognized that the obligation to serve the interstate market imposed by a certificate of unlimited duration could not be terminated by private contractual arrangements. In that case, a producing company which had contracted with a pipeline to supply gas for 20 years sought a certificate from the Commission limited to that period. The Commission insisted on a permanent certificate; and this Court upheld its authority to do so, holding that even after the contract expired, the producer would remain under an obligation to supply gas to the pipeline, unless permission to abandon service had been obtained. The obligation on the producer which survived after the contract term "will not be one imposed by contract but by the act." 364 U.S., at 155. The obligation to continue the service despite the provisions of the sale contract was held essential to effectuate the purposes of the Act; otherwise producers and pipelines would be

free to make arrangements that would circumvent the ratemaking and supply goals of the statute. *Id.*, at 142-47.

Similar principles control this case. The issuance of a certificate of unlimited duration covering the gas at issue here create a federal obligation to serve the interstate market until abandonment had been obtained. . . . Just as in *Sunray*, the service obligation imposed by the Commission survived the expiration of the private agreement which gave rise to the Commission's jurisdiction.

The Commission "had long drawn distinction between the underlying service to the public a natural gas company performs and the specific manifestation—the contractual relation—that the service takes at a given moment." *Id.*, at 152. Just as the federal obligation is held paramount to private arrangements in *Sunray*, that obligation must be recognized here. Once the gas commenced to flow into interstate commerce from the facilities used by the lessees, §7(b) required that the Commission's permission be obtained prior to the discontinuance of 'any service rendered by means of such facilities.' Private contractual arrangements might shift control of the facilities and thereby determine *who* is obligated to provide that service, but the parties may not simply agree to terminate the service obligation without the Commission's permission. 56 L.Ed.2d at 510-11.

Clearly, if the Commission under certificate powers conferred by Section 7 of the Natural Gas Act has the power to assure that service once commenced continues beyond the end of the contract, *a fortiori*, the Commission has power to require that certificated service deliverability should continue during the term of the contract. Without this authority, the requirements

of Section 7 for continued service, and the particular requirements of Section 7(b) against abandonment, could be rendered meaningless. If the Commission lacks jurisdiction over continued service and deliverability requirements, the producers would be free to simply reduce service to a *de minimis* amount. This would be tantamount to a constructive abandonment over which the FERC would be powerless to act. Clearly, the Commission's authority to require the continuation of service under the *Sunray* case, and *Southland Royalty* cases, of necessity contains the authority to prescribe the reasonable terms and conditions for the continuation of such service; otherwise, the authority to continue service is a shadow.

The decision of the court of appeals below ruling that the Commission lacks jurisdiction under Section 7 to order standards for the delivery of natural gas by producers, would reverse long years of established practice under the Commission's regulations. As noted, *supra*, the Commission has for many years required certificate applications to include detailed exhibits showing the deliverability of natural gas and the reserves, which provide the whole underpinning for the proposed expansion of certificated service by interstate pipelines. 18 C.F.R. §157.14(a)(10). Without the power to enforce representations by producers and pipelines as to the deliverability requirements upon which pipeline expansions have taken place and billions of dollars expended, the certificates of the Commission will be based upon a shifting house of sand. Such a result is inconsistent with the express language of Section 7(b) which authorizes a natural gas company to obtain an abandonment only after first seeking the permission and approval of the Commission and the presentation of

evidence to obtain "a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment." 15 U.S.C. §717(f)(b). This language of Section 7(b) of the Act would be meaningless surplusage if the Commission lacks jurisdiction to set reasonable terms and conditions for the continued service of specified volumes of natural gas under a certificate. Similarly, Section 4(b) of the Act provides that "unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, *or service*, or any rule, regulation, or contract relating thereto, except after 30 days' notice to the Commission and to the public." 15 U.S.C. §717(c)(d); emphasis added. To the extent that natural gas deliveries have been certificated from producers to interstate pipelines as part of the certificate, Section 4(d) of the Act requires their continuation without prior approval obtained from the Commission.

The contention by the court of appeals below that the jurisdiction of the Commission to specify service requirements is limited by the exemption of Section 1(b) is misplaced. The specification by the Commission of deliverability requirements upon the issuance of a certificate is similar to the specification of the wellhead rate at which the gas should be sold, and neither involves a violation of the second clause of Section 1(b).

In *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672 (1954), this Court considered at length the meaning of the second clause of Section 1(b) and concluded that the affirmative grant of jurisdiction over

sales by producers to interstate pipelines in the first clause of §1(b) is not limited by the negative second clause of this section excluding "production or gathering of natural gas":

> . . . In our view, the statutory language, the pertinent legislative history, and the past decisions of this Court all support the conclusion of the Court of Appeals that Phillips is a 'natural-gas company' within the meaning of that term as defined in the Natural Gas Act, and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction and regulation by the Federal Power Commission.

Since the rates for the "sales" from the producer to the interstate pipeline are subject to Commission jurisdiction, terms and conditions set by the Commission for the continuation of service under such sales are similarly subject to the Commission's jurisdiction; neither involves any Commission intrusion into the limited exemption for "production and gathering" in the second clause of Section 1(b).

Closely in point here is the Supreme Court's decision in *United Gas Improvement Company v. Continental Oil Company*, 381 U.S. 392 (1965) (Rayne Field). There, producers having unsuccessfully sought to obtain a high sales price for the gas from Rayne Field, cancelled their sales contracts and proposed to sell their leasehold interests in the Rayne Field lands in which the natural gas was located to the pipeline, Texas Eastern. The gas reserves in Rayne Field were proven, and the field substantially developed. After asserting jurisdiction over the lease-sales, the Commission concluded that it would not be in the public interest to certificate them because of the inability to effectively regulate the unit sales. The Fifth Circuit Court of

Appeals reversed holding that the leases involved "relate to the production or gathering of natural gas and are thus outside the Commission's jurisdiction." (*M.H. Marr v. FPC*, 336 F.2d 320, 325 (1964)). The Supreme Court reversed, holding that the production and gathering language of the second clause of Section 1(b) did not deprive the Commission of jurisdiction over the transaction:

> We turn then to the question whether these lease-sales, even though sales of natural gas within the meaning of the Act, are nonetheless outside Commission jurisdiction because of the exemption for "production or gathering."
>
> The statement in Phillips that "production and gathering, in the sense that those terms are used in §1(b), end(ed) before the sales by Phillips occur(red)" 347 U.S., at 678 97 L.ed at 1045), could be read to turn the "production or gathering" exemption purely on a matter of the timing of the title transfer. That would mean, of course, that the lease-sales here involved were within the production or gathering exemption, for at the time of the transfer the gas was still in the ground. The same would be true for any sale of gas in place. Acceptance of any such narrow interpretation would make Phillips a shadow. Its substance lies, instead, in the judgment that "(p)rotection of consumers against exploitation at the hands of natural-gas companies was the primary end of the Natural Gas Act," id., at 685, 98 L.ed at 1049, and "congressional intent (was) to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce." Id., at 682, 98 L.ed. at 1047. We have not limited Phillips to a matter of the timing of the transaction, see Cities Service Gas Co. v. State Corp. Comm'n of Kansas,

355 U.S. 391, 2 L.ed 2d 355, 78 S. Ct. 381, reversing, per curiam, 180 Kan. 454, 304 P.2d 528, and considered that it would be a mistake to do so.

> We conclude that even though a sale of natural gas in interstate commerce occurs before production or gathering is ended, it is nonetheless subject to regulation. In the context of such a sale, as distinguished from the situation in FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 93 L.ed 1499, 69 S. Ct. 1251, to be discussed hereafter, the "production or gathering" exemption relates to the physical activities, processes and facilities of production or gathering, but not to sales of the kind affirmatively subjected to Commission jurisdiction. This accommodation of the two relevant clauses of §1(b) gives content to the national objectives of the Natural Gas Act as expounded in Phillips, and to the Commission's jurisdiction to accomplish them, while in no way interfering with state regulatory power over the physical processes of production or gathering in furtherance of conservation or other legitimate state concerns. (381 U.S. 402-03.)

Thus, the holding of the court of appeals below which apparently would preclude the Commission from jurisdiction to establish deliverability requirements to govern sales by producers to interstate pipelines in interstate commerce would in effect reverse the thrust of this Court's decision in *Southland Royalty*, *Sunray*, *First Phillips* and the *Rayne Field Cases* as well as setting aside the long-established administrative construction by the Commission in its regulations requiring explicit evidence of deliverability and reserves by producers in their sales to interstate pipelines in issuing certificates under Section 7 (18 C.F.R. §157.14). The

necessity of the Commission's jurisdiction to impose reasonable terms and conditions for the continued service of producers under committed sales to interstate pipelines is clear. Without such jurisdiction, the Commission can assure no volume of natural gas deliveries, the producers can undertake a constructive abandonment of existing committed certificate obligations, and the net impact would be, as this Court stated in the *Rayne Field* case, such a narrow interpretation of §1(b) would preclude the "[p]rotection of consumers against exploitation at the hands of natural-gas companies [which] was the primary aim of the Natural Gas Act." (381 U.S. at 402).

CONCLUSION

For the reasons set forth above, (1) the judgment of the Court of Appeals below should be reversed; (2) the decision of the Commission in Order 539–B establishing a "prudent operator" standard set aside; and (3) the case remanded to the Commission to undertake enforcement of established deliverability requirements in existing certificates and to prescribe such future deliverability requirements in all future certificates to assure consumers of continued deliveries of natural gas from committed sales.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
WHEATLEY & WOLLESEN
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
Attorney for Amici Curiae.

November 16, 1978